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Responsibility of States for internationally wrongful acts

Responsibility of States for internationally wrongful acts

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

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Abbreviations

BIT	bilateral investment treaty
ECHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
SCM Agreement	Agreement on Subsidies and Countervailing Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

I. Introduction

1. The International Law Commission adopted the draft articles on responsibility of States for internationally wrongful acts at its fifty-third session, in 2001. In resolution 56/83 of 12 December 2001, the General Assembly took note of the articles (hereinafter referred to as the State responsibility articles), the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

2. As requested by the General Assembly in resolution 59/35 of 2 December 2004, the Secretary-General prepared a compilation of decisions of international courts, tribunals and other bodies referring to the State responsibility articles.[1] A second compilation was prepared by the Secretary-General, in 2010, on the basis of the request of the General Assembly in resolution 62/61 of 6 December 2007.[2]

3. In resolution 65/19 of 6 December 2010, the General Assembly acknowledged the importance of the State responsibility articles, and commended them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in that regard, and to submit that material well in advance of its sixty-eighth session.

4. By a note verbale dated 10 March 2011, the Secretary-General invited Governments to submit, no later than 1 February 2013, information regarding decisions of international courts, tribunals and other bodies referring to the articles for inclusion in an updated compilation. By a note verbale dated 19 January 2012, the Secretary-General reiterated that invitation.

5. The present compilation includes an analysis of a further 56 cases in which the State responsibility articles were referred to in decisions taken during the period from 1 February 2010[3] to 31 January 2013. Such references were found in the decisions of the International Court of Justice; the International Tribunal for the Law of the Sea; the WTO Appellate Body; international arbitral tribunals; panels established under GATT and WTO; the African Commission for Human Rights; the Court of Justice of the European Union; the European Court of Human Rights; and the Inter-American Court of Human Rights.

6. The present compilation, which supplements the two previous Secretariat compilations on the topic, reproduces the relevant extracts of decisions under each of the articles referred to by international courts, tribunals or bodies, following the structure and numerical order of the State responsibility articles. Under each article, decisions appear in chronological order. In view of the number and length of the decisions, the compilation includes only the relevant extracts of the decisions referring to the State responsibility articles, together with a brief description of the context in which the reference was made.

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[1] A/62/62 and Corr.1 and Add.1.

[2] A/65/76.

[3] One decision, handed down prior to 2010 but not previously covered, has been included in the present compilation.

7. The compilation contains those extracts in which the State responsibility articles are invoked as the basis for the decision or where the articles are referred to as reflecting the existing law governing the issue at hand. It does not cover the submissions of the parties invoking the State responsibility articles, nor opinions of judges appended to a decision.

II. Extracts of decisions referring to the articles on responsibility of States for internationally wrongful acts

General comments

Ad hoc committee (under the ICSID Convention)

8. The ad hoc committee in *Sempra Energy International v. Argentine Republic* found that the rules of customary international law reflected in the articles did not necessarily enjoy a peremptory (*jus cogens*) status.[4]

WTO panel

9. The panel established in the *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, as part of its analysis of the Agreement on Subsidies and Countervailing Measures SCM Agreement, considered whether the State responsibility articles (1) were "recognized in the WTO as 'rules of international law applicable in the relations between the parties' to the dispute", and (2) whether the articles were "relevant" to the particular dispute at issue.[5]

10. On the first question, the panel indicated that, in its view, citations to the articles in prior WTO disputes "have been as conceptual guidance only to supplement, or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements".[6] In addition, the panel referenced cases where "panels and the Appellate Body have made explicit that the Draft Articles are not binding", and thus found that there was "no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles must be taken into account as 'rules of international law applicable in the relations between parties' in interpreting the WTO Agreement ...".[7]

11. The panel also noted that the articles are "not concerned with the substance of the underlying international obligations, but are rather concerned with determining whether a state is or is not responsible for a given action that may constitute a substantive breach of such an obligation".[8] The panel concluded that the articles

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[4] ICSID, Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010, para. 202 ("*Jus cogens* does not require parties to a bilateral investment treaty to forego the possibility of invoking a defence of necessity in whatever terms they may agree"). See also article 25, below.

[5] WTO, Report of the Panel, WT/DS379/R, 22 October 2010, para. 8.87.

[6] Ibid.

[7] Ibid., para. 8.89.

[8] Ibid., para. 8.90. For discussion of the panel's consideration of article 55 of the State responsibility articles on *lex specialis*, see below notes 200 to 203.

were not "'relevant rules of international law applicable to the relations between the parties', such that [it] should 'take them into account, together with the context' in the sense of Article 31(3)(c) of the Vienna Convention [on the Law of Treaties, 1969]."[9]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

12. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that, as confirmed by the State responsibility articles, "[t]he failure by a Sponsoring State to meet its obligations not resulting in material damage is covered by customary law which does not make damage a requirement for the liability of States."[10]

WTO Appellate Body

13. In its report reviewing the panel report in the *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case (see above), the Appellate Body stated that:

> " ... the Panel misconstrued the role of the ILC Articles when it set out to analyze 'whether [the ILC Articles] would override [the Panel's] analysis and conclusions based on the text of the SCM Agreement itself'. The question is not whether intermediate results of one element of the interpretative exercise 'override' the results of another. Rules of international law within the meaning of Article 31(3)(c) are one of several means to ascertain the common intention of the parties to a particular agreement reflected in Article 31 of the Vienna Convention [on the Law of Treaties]."[11]

14. The Appellate Body continued by noting that:

> "[w]e are puzzled by the Panel's statement that the ILC Articles have been cited by panels and the Appellate Body 'as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements'."[12]

15. While the WTO panel, as noted previously, found that panels and the Appellate Body had not considered the State responsibility articles to constitute rules of international law in the sense of article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Appellate Body observed that prior WTO jurisprudence "evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(c) by panels and the Appellate Body ...".[13]

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[9] Ibid., para. 8.91.

[10] ITLOS, Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, para. 210.

[11] WTO, Report of the Appellate Body, WT/DS379/AB/R, 11 March 2011, para. 312 (quoting the Report of the Panel, note 5 above, para. 8.84).

[12] Ibid., para. 313 (quoting the Report of the Panel, note 5 above, para. 8.87).

[13] Ibid., para. 313.

European Court of Human Rights

16. In *Kotov v. Russia*, the European Court of Human Rights referred to the State responsibility articles as "codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts".[14]

Part One
The internationally wrongful act of a State

Chapter I
General principles

International arbitral tribunal (under the ICSID Convention)

17. The arbitral tribunal in *Burlington Resources Inc. v. Republic of Ecuador* referred generally to the State responsibility articles in support of the assertion that "someone's breach of an obligation corresponds to the breach of another's right".[15]

Article 1
Responsibility of a State for its internationally wrongful acts

International arbitral tribunal (under the ICSID Convention)

18. The arbitral tribunal in *El Paso Energy International Company v. The Argentine Republic* referred to articles 1 and 3 of the State responsibility articles in determining that "the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions".[16]

International arbitral tribunal (under the ICSID Convention)

19. In its award, the arbitral tribunal in *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, "under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary".[17]

Article 2[18]
Elements of an internationally wrongful act of a State

International arbitral tribunal (under NAFTA and UNCITRAL Rules)

20. The arbitral tribunal constituted to hear the *Merrill & Ring Forestry L.P. v. The Government of Canada* case indicated that, although the commentary to article 2 provides that whether damage is "'required depends on the content of the primary

[14] ECHR, Grand Chamber, *Kotov v. Russia*, Application No. 54522/00, Judgment, 3 April 2012, para. 30.

[15] ICSID, Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 214, note 355.

[16] ICSID, Case No. ARB/03/15, Award, 31 October 2011, para. 130.

[17] ICSID, Case No. ARB/09/16, Award, 6 July 2012, para. 261, note 323.

[18] See also the *Castillo González et al. v. Venezuela* case referred to below under Article 4.

obligation, and there is no general rule in this respect'[,] ... in the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage".[19]

International arbitral tribunal (under the ICSID Convention)

21. The arbitral tribunal in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* indicated that article 2 is "not an autonomous basis for attribution", but rather "only articulates the elements of the definition an internationally wrongful act of a State", which "must be attributable to the State and violate an international obligation of the State".[20]

Permanent Court of Arbitration (under UNCITRAL Rules)

22. In its final award, the arbitral tribunal in *Frontier Petroleum Services LTD. v. The Czech Republic* referred to article 2 and its accompanying commentary in support of the assertion that "[t]here is little doubt that the term 'measure' generally encompasses both actions and omissions of a state in international law".[21]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

23. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that a provision of UNCLOS constitutes an exception to the customary international law rule reflected in the commentary to article 2, which provides that "a State may be held liable ... even if no material damage results from its failure to meet its international obligations".[22]

Article 3[23]
Characterization of an act of a State as internationally wrongful

Permanent Court of Arbitration (under UNCITRAL Rules)

24. In its interim award on jurisdiction and admissibility in *Hulley Enterprises Limited v. The Russian Federation*,[24] *Yukos Universal Limited v. The Russian Federation*[25] and *Veteran Petroleum Limited v. The Russian Federation*,[26] the arbitral tribunal, as part of its consideration of the relationship between international and domestic law in the treaty context, accepted an expert opinion, submitted by James Crawford, which cited articles 3 and 32 in support of the proposition that there existed "a strong presumption of the separation of international from national law".[27]

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[19] UNCITRAL, Award, 31 March 2010, para. 245 (quoting James Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, at 84).
[20] ICSID, Case No. ARB/07/24, Award, 18 June 2010, para. 173.
[21] PCA, Final Award, 12 November 2010, para. 223.
[22] See note 10 above, para. 178 (citing para. (9) of the commentary to Article 2) and para. 210.
[23] See the *El Paso Energy International Company v. The Argentine Republic* case referred to above under article 1.
[24] PCA, Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[25] Ibid., Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[26] Ibid., Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[27] See notes 24, 25 and 26 above, para. 316.

International arbitral tribunal (under the ICSID Convention)

25. The ad hoc committee constituted to consider the Application for Annulment of the Award rendered in the *Helnan International Hotels A/S v. Arab Republic of Egypt* case relied upon article 3 in finding that "a decision by a municipal court ... could not preclude the international tribunal from coming to another conclusion applying international law".[28]

International arbitral tribunal (under the ICSID Convention)

26. The arbitral tribunal in *Total S.A. v. Argentine Republic* referred to article 3 as a restatement of the "general principle of customary international law according to which, for the purpose of State responsibility for the commission of an internationally wrongful act, the characterization of an act as lawful under the State's law is irrelevant".[29]

International arbitral tribunal

27. The arbitral tribunal constituted to hear the *Claimant v. The Slovak Republic* case referred to article 3 in support of the assertion that, even where municipal law may be relevant to the merits, it was "not the 'governing' law, but it constitute[d] a factual circumstance to be considered for ascertaining whether the host State committed a breach of its international duties in the enforcement of its own law".[30]

International arbitral tribunal (under the ICSID Convention)

28. In its award, the arbitral tribunal in *EDF International S.A., et al. v. Argentine Republic* referred to article 3 in support of the assertion that "the legality of the Respondent's acts under national law does not determine their lawfulness under international legal principles".[31]

International arbitral tribunal (under the ICSID Convention)

29. The arbitral tribunal in *Iberdrola Energía S.A. v. The Republic of Guatemala* referred to article 3 in agreeing that "the legality of the conduct of a State under its domestic law does not necessarily lead to the legality of such conduct under international law".[32]

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[28] ICSID, Case No. ARB/05/19, Decision of the ad hoc committee, 14 June 2010, para. 51, note 48.

[29] ICSID, Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 40, note 21.

[30] Ad hoc Arbitration, Award, 5 March 2011, para. 197, note 217 (citing ICSID, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. The Argentine Republic*, Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 94 and notes (commenting on article 3)).

[31] ICSID, Case No. ARB/03/23, Award, 11 June 2012, paras. 906-907.

[32] ICSID, Case No. ARB/09/5, Award, 17 August 2012, para. 367, note 354.

Chapter II
Attribution of conduct to a State

General comments

WTO panel

30. The panel in *United States — Certain Country of Origin Labelling (COOL) Requirements* observed that the "relevant provisions" of the State responsibility articles are consistent with the notion that acts or omissions attributable to a WTO member are "in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[33]

European Court of Human Rights

31. In *Kotov v. Russia*, the European Court of Human Rights referred to the commentary to Chapter II in describing the law relevant to the attribution of international responsibility to States.[34]

Article 4[35]
Conduct of organs of a State

International arbitral tribunal (under the ICSID Convention)

32. The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[36] The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[37]

International arbitral tribunal (under the ICSID Convention)

33. The ad hoc committee constituted to hear the annulment proceeding in the case of *Helnan International Hotels A/S v. Arab Republic of Egypt* referred to article 4 of the State responsibility articles in finding that: "the decision of a Government Minister, taken at the end of an administrative process … is one for which the State is undoubtedly responsible at international law, in the event that it breaches the international obligations of the State".[38]

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[33] WTO, Reports of the Panel, WT/DS384/R and WT/DS386/R, 18 November 2011, para. 7.16, note 41.

[34] See note 14 above, para. 30 (citing paragraph (6) of the commentary to Chapter II).

[35] See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* below, note 56; *Bosh International, Inc. & B & P Ltd. Foreign Investments Enterprise v. Ukraine* below, note 75; *White Industries Australia Limited v. The Republic of India* below, note 87; and *Teinver S.A. et al. v. The Argentine Republic* below, note 99.

[36] ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 274 (quoting articles 4, 5 and 11).

[37] Ibid., paras. 274 and 280.

[38] See note 28 above, para. 51, note 47.

International arbitral tribunal (under the ICSID Convention)

34. The arbitral tribunal in *Alpha Projektholding GmbH v. Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ ... is clearly attributable to the State under Article 4(1) of the ILC Articles".[39] The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[40]

International arbitral tribunal (under UNCITRAL Rules)

35. The arbitral tribunal in the *Sergei Paushok et al. v. The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[41] While noting that the State responsibility articles "do not contain a definition of what constitutes an organ of the State",[42] the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[43]

36. The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[44]

Permanent Court of Arbitration

37. The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* referred to the State responsibility articles and recalled that, "as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs ...".[45]

International arbitral tribunal (under UNCITRAL Rules)

38. The arbitral tribunal in *Claimants v. Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission ...".[46] Upon consideration of article 4, Slovak law and the relevant factual circumstances, the tribunal determined that certain entities and individuals were State organs, "responsible for the actions they have performed in their official capacity in accordance with Article 4 of the ILC Articles",[47] while others were not.[48]

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[39] ICSID, Case No. ARB/07/16, Award, 8 November 2010, para. 401.
[40] Ibid., para. 402.
[41] UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paras. 576 and 577.
[42] Ibid., para. 581.
[43] Ibid., para. 582.
[44] Ibid., para. 580.
[45] PCA, Case No. 2009-23, First Interim Award on Interim Measures, 25 January 2012, para. [2.10.2].
[46] UNCITRAL, Final Award, 23 April 2012, paras. 150-151.
[47] Ibid., para. 152.
[48] Ibid., paras. 155 and 163.

Permanent Court of Arbitration (under UNCITRAL Rules)

39. The arbitral tribunal constituted to hear the *Ulysseas, Inc. v. The Republic of Ecuador* case relied upon article 4 in determining that certain entities were not organs of the Ecuadorian State, notwithstanding that they were "part of the Ecuadorian public sector and [were] subject to a system of controls by the State in view of the public interests involved in their activity ...".[49]

International arbitral tribunal (under the ICSID Convention)

40. The arbitral tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* noted that, "[u]nder international law, a State can be found to have discriminated either by law, regulation or decree. Article 4.1 of the Articles on Responsibility of States for Internationally Wrongful Acts ... is controlling".[50]

Inter-American Court of Human Rights

41. In its judgment in *Castillo González et al. v. Venezuela, the Inter-American Court of Human Rights* indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[51]

42. The Court also referred to article 4 in finding that "it is for the Court to determine whether or not the actions of a State organ, such as those in charge of the investigations, constitute a wrongful international act ...".[52]

International arbitral tribunal (under the ICSID Convention)

43. The arbitral tribunal constituted to hear the *Electrabel S.A. v. The Republic of Hungary* case determined that "[t]here is no question that the acts of the Hungarian Parliament are attributable to the Hungarian State, in accordance with Article 4 of the ILC Articles ...".[53]

International arbitral tribunal (under the ICSID Convention)

44. In its January 2013 award, the arbitral tribunal in *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela* cited the commentary to article 4 in support of the assertion that "[i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt".[54]

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[49] PCA, Final Award, 12 June 2012, paras. 135 and 126.

[50] ICSID, Case No. ARB/06/11, 5 October 2012, para. 559.

[51] Inter-American Court of Human Rights, Judgment, 27 November 2012, para. 110, note 51 (quoting Articles 2 and 4 of the State responsibility articles).

[52] Ibid., para. 160, note 94 (citing Article 4.1 of the State responsibility articles) (internal footnote omitted).

[53] ICSID, Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.89. For an extended account of the tribunal's consideration of the State responsibility articles and the question of attribution under international law, see below notes 95 to 98.

[54] ICSID, Case No. ARB/(AF)/04/6, Award, 16 January 2013, para. 209, note 209 (citing para. (6) of the commentary to Article 4).

Article 5[55]

Conduct of persons or entities exercising elements of governmental authority

International arbitral tribunal (under the ICSID Convention)

45. In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[56] Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control ... of the State, even if it is a private or public party (Article 8)".[57] The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[58]

46. Upon consideration of the relevant law and facts, the tribunal concluded that, under article 5, the entity exercised "elements of governmental authority".[59] Nonetheless, the tribunal indicated that such a conclusion "in itself clearly does not resolve the issue of attribution ... . [F]or an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law."[60]

47. In applying article 5 to the particular acts at issue, the tribunal "concentrated on the utilisation of governmental power", and assessed whether the entity in question "acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers ... . It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act."[61]

48. The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[62]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

49. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed

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[55] See also *Alpha Projektholding GmbH v. Ukraine* above, note 39; *Sergei Paushok et al. v. The Government of Mongolia* above, note 41; *White Industries Australia Limited v. The Republic of India* below, note 87; *Teinver S.A. et al. v. The Argentine Republic* below, note 99; and *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, above, note 36, and below, note 81.

[56] See note 20 above, para. 172.

[57] Ibid.

[58] Ibid., paras. 175-177.

[59] Ibid., para. 192.

[60] Ibid., para. 193.

[61] Ibid., para. 202; see also paras. 255, 266 and 284.

[62] Ibid., para. 198.

Disputes Chamber indicated that certain rules on the liability of sponsoring States in UNCLOS

> "are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility)".[63]

WTO Appellate Body

50. In its report in the *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[64] The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[65] The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[66]

51. Concerning whether the State responsibility articles are "rules of international law ... applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[67]

52. The Appellate Body also indicated that, "despite certain differences between the attribution rules", its interpretation of the term "public body" as found in the SCM Agreement "coincides with the essence of Article 5".[68]

53. In the light of its determination that article 5 supported, rather than contradicted, its interpretation of the SCM Agreement, and "because the outcome of [its] analysis [did] ... not turn on Article 5", the Appellate Body indicated that it was "not necessary ... to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law".[69]

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[63] See note 10 above, para. 182.

[64] See note 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(c)).

[65] Ibid., para. 308.

[66] Ibid., para. 309.

[67] Ibid., para. 308; see below, note 204 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by ... the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; ibid., para. 314.

[68] Ibid., para. 310.

[69] Ibid., para. 311.

European Court of Human Rights

54. In its judgment in *Kotov v. Russia*, the European Court of Human Rights referred to the commentary to article 5 as part of its elaboration of the law relevant to the attribution of international responsibility to States.[70] The Court quoted excerpts of the commentary relevant to the determination of which entities, including "parastatal entities", were to be regarded as "governmental" for the purposes of attribution under international law.[71]

International arbitral tribunal (under UNCITRAL Rules)

55. The arbitral tribunal in *Claimants v. Slovak Republic* noted that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission ...".[72] Upon consideration of articles 5 and 8, the tribunal determined that, on the basis of the evidence presented, the acts of certain non-State entities and individuals could not be said to have been "carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State".[73]

Permanent Court of Arbitration (under UNCITRAL Rules)

56. The arbitral tribunal in the *Ulysseas, Inc. v. The Republic of Ecuador* case determined that the conduct of certain entities, despite not constituting organs of the Ecuadorian State, "may nonetheless fall within the purview of Article 5 of the ILC Articles and [the relevant] BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are '*acting in that capacity in the particular instance*'."[74]

International arbitral tribunal (under the ICSID Convention)

57. In its award, the arbitral tribunal in *Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. Ukraine* relied upon article 5 in its analysis of whether a university's conduct was attributable to Ukraine.

58. The tribunal considered (1) whether the university was "empowered by the law of Ukraine to exercise elements of governmental authority", and (2) whether "the conduct of the University relates to the exercise of that governmental authority".[75]

59. With regard to the second aspect of its analysis, the tribunal relied upon the commentary to article 5 in indicating that "the question that falls for determination is whether the University's conduct in entering into and terminating the [relevant

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[70] See note 14 above, paras. 31-32 (quoting paras. (3) and (6) of the commentary to Article 5).

[71] Ibid.

[72] See note 46 above, paras. 150-151.

[73] Ibid., paras. 156-159; the tribunal added that, "if it were established that a State organ had acted under the influence of [a non-state entity], such acts would be attributable to the State."; see also para. 163.

[74] See note 49 above, para. 135 (quoting article 5).

[75] ICSID, Case No. ARB/08/11, Award, 25 October 2012, para. 164 (citing James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002), p. 100).

contract] can be understood or characterised as a form of 'governmental activity', or as a form of 'commercial activity'".[76]

60. The tribunal also referred to article 5 as part of its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) ...".[77]

Article 6[78]
Conduct of organs placed at the disposal of a State by another State

European Court of Human Rights

61. In its 2012 judgment in the case of *Catan and Others v. Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[79]

International arbitral tribunal (under the ICSID Convention)

62. The arbitral tribunal in *Electrabel S.A. v. The Republic of Hungary* referred to article 6 in considering the legal effect of a decision of the European Commission. Relying upon article 6 and the commentary thereto, the tribunal determined that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the [relevant treaty], for the purpose of applying Article 6 of the ILC Articles in the present case".[80]

Article 7
Excess of authority or contravention of instructions

International arbitral tribunal (under the ICSID Convention)

63. In its award, the arbitral tribunal in *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* recalled that, during the jurisdictional phase, it had found that, according to article 7, "even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State".[81] The tribunal had concluded that the Republic of Georgia could not avoid the legal effect of its conduct by arguing that it was void *ab initio* under Georgian law.[82]

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[76] Ibid., para. 176.

[77] Ibid., para. 246. The tribunal stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles."; see also para. 163, and para. 248 for an additional reference to article 5.

[78] See also the *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* case referred to under Article 1 above.

[79] ECHR, Grand Chamber, Applications nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012, para. 74.

[80] See note 53 above, para. 6.74.

[81] See note 36 above, para. 273 (quoting Decision on Jurisdiction, 6 July 2007, para. 190).

[82] Ibid., para. 273 (quoting Decision on Jurisdiction, para. 191).

Court of Justice of the European Union

64. The opinion of Advocate General Kokott in *European Commission v. Italian Republic* referred to article 7 in support of the assertion that, "even if it should be found that the [State] officials committed a criminal offence this would not stop their actions being imputable to the State".[83]

European Court of Human Rights

65. In its 2012 judgment in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[84]

Article 8[85]
Conduct directed or controlled by a State

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

66. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber referred to the commentary to article 8 in support of the assertion that, "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law".[86]

International arbitral tribunal (under UNCITRAL Rules)

67. In its award, the arbitral tribunal in *White Industries Australia Limited v. The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[87]

68. The tribunal determined that, under article 8, the salient attribution issue "turn[ed] on whether the facts in the record support a conclusion of whether [the entity] was in fact acting on the instructions of or under the direction or control of India".[88] The tribunal further noted that the test under article 8 "is a tough one",[89]

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[83] Court of Justice of the European Union, Case C-334/08, Opinion of Advocate General Kokott, 15 April 2010, paras. 29 and 30, and note 11.

[84] ECHR, Grand Chamber, Application No. 39630/09, Judgment, 13 December 2012, para. 97.

[85] See also *Alpha Projektholding GmbH v. Ukraine* above, note 39; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* above, note 56; *Claimants v. Slovak Republic* above, notes 46 and 72; *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* above, note 64; and *Bosh International, Inc. and B & P Ltd. Foreign Investments Enterprise v. Ukraine* above, note 75.

[86] See note 10 above, para. 112 (citing para. (1) of the commentary to Article 8).

[87] UNCITRAL, Final Award, 30 November 2011, para. 8.1.2.

[88] Ibid., paras. 8.1.3-8.1.4 and 8.1.7.

[89] Ibid., para. 8.1.4.

"involves a high threshold",[90] and "excludes from consideration matters of organisational structure and 'consultation' on operational or policy matters".[91]

69. In addition, the tribunal took note of the International Court of Justice's "effective control" test, as well as the discussion of the test in the context of state-owned and controlled enterprises in the commentary to article 8.[92] On the basis of that test, the tribunal determined that the claimant had to "show that India had both general control over [the entity] as well as specific control over the particular acts in question".[93]

European Court of Human Rights

70. In its 2012 judgment in the case of *Catan and Others v. Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[94]

International arbitral tribunal (under the ICSID Convention)

71. In its decision on jurisdiction, applicable law and liability, the arbitral tribunal in *Electrabel S.A. v. The Republic of Hungary* relied upon the State responsibility articles as a codification of the customary international law relevant to attribution.[95] Largely on the basis of article 8 and its accompanying commentary, the tribunal determined that "[a]lthough the conduct of private persons or entities is not attributable to the State under international law as a general principle, factual circumstances could establish a special relationship between the person engaging in the conduct and the State".[96]

72. The tribunal indicated that, as "expressed in the clearest possible terms in the ILC Commentary under Article 8", a State acting "through a State-owned or State controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[97] As a result, the tribunal found that it was required to assess whether the "private entity" at issue was acting either under the instruction or direction and control of the Hungarian Government.[98]

International arbitral tribunal (under the ICSID Convention)

73. The arbitral tribunal in *Teinver S.A., et al. v. The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the

[90] Ibid., para. 8.1.10.

[91] Ibid., para. 8.1.8.

[92] Ibid., paras. 8.1.11-8.1.15 (quoting International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment, *I.C.J. Reports 1986*, pp. 62, 65, at paras. 109 and 115; International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, *I.C.J. Reports 2007*, p. 208, at para. 400, as well as paras. (4) and (6) of the commentary to article 8).

[93] Ibid., para. 8.1.18.

[94] See note 79 above.

[95] See note 53 above, para. 7.60.

[96] Ibid., para. 7.71, and paras. 7.64, 7.66 and 7.68.

[97] Ibid., para. 7.95.

[98] Ibid., paras. 7.64-7.71.

Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[99] Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct ...".[100]

Article 9
Conduct carried out in the absence or default of the official authorities

International arbitral tribunal (under UNCITRAL Rules)

74. The arbitral tribunal in *Sergei Paushok et al. v. The Government of Mongolia* referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[101]

Article 11[102]
Conduct acknowledged and adopted by a State as its own

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

75. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in the United Nations Convention on the Law of the Sea "are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility)".[103]

Chapter III
Breach of an international obligation

Article 13
International obligation in force for a State

International Court of Justice

76. In its judgment in *Jurisdictional Immunities of the State (Germany v. Italy)*, the International Court of Justice referred to article 13 in support of the assertion that "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred".[104]

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[99] ICSID, Case No. ARB/09/1, 21 December 2012, para. 274.

[100] Ibid., para. 275.

[101] See note 41 above, para. 576.

[102] See also *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* above, notes 36 and 81.

[103] See note 10 above, para. 182.

[104] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, para. 58.

International arbitral tribunal (under the ICSID Convention)

77. The arbitral tribunal in *Railroad Development Corporation v. Republic of Guatemala* referred to article 13 in support of the assertion that a "[t]reaty cannot be breached before it entered into force ...".[105]

Article 14[106]
Extension in time of the breach of an international obligation

Inter-American Court of Human Rights

78. In its judgment in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Inter-American Court of Human Rights referred to article 14 in support of the assertion that "acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations".[107]

WTO Appellate Body

79. In its report in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, the Appellate Body referred to article 14 in determining that, under the SCM Agreement, it is the causing of "adverse effects to the interests of other Members ... that is relevant ... and the conclusion as to retroactivity will hinge on whether that situation continues or has been completed, rather than on when the act of granting a subsidy occurred".[108] While agreeing that, on the basis of article 14, "it is important to distinguish between an act and its effects", the tribunal indicated that "the SCM Agreement is concerned, however, with a situation that continues over time, rather than with specific 'acts'".[109]

International arbitral tribunal (under the ICSID Convention)

80. The arbitral tribunal constituted to hear the *Pac Rim Cayman LLC v. The Republic of El Salvador* case considered the "well-established distinctions under customary international law" recognized in the commentary to articles 14 and 15 between a "one-time act", a "continuous act" and a "composite act".[110] Upon consideration of the commentary to articles 14 and 15, as well as the factual circumstances of the dispute,[111] the tribunal determined that the alleged measure "should be considered as a continuing act under international law ...".[112]

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[105] ICSID, Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 29 June 2012, para. 116 (quoting article 13).

[106] See also *Sergei Paushok et al. v. The Government of Mongolia* below, note 117.

[107] Inter-American Court of Human Rights, Judgment, 24 November 2010, para. 17, note 24.

[108] WTO, Report of the Appellate Body, WT/DS316/AB/R, 18 May 2011, para. 684.

[109] Ibid., para. 685 (internal quotations omitted).

[110] See ICSID, Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.65-2.74.

[111] Ibid., paras. 2.65-2.93.

[112] Ibid, para. 2.94.

Inter-American Court of Human Rights

81. In its 2012 judgment in *Castillo González et al. v. Venezuela*, the Inter-American Court of Human Rights cited article 14(3) in holding that "international responsibility of the State may arise from human rights violations committed by individuals or third parties, in the context of the State's obligations to ensure respect for human rights among individuals".[113]

European Court of Human Rights

82. In its 2012 judgment in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[114]

Article 15[115]
Breach consisting of a composite act

International arbitral tribunal (under the ICSID Additional Facility Rules)

83. The arbitral tribunal constituted to hear the *Gemplus S.A. et al. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* cases relied upon article 15 and its accompanying commentary to determine the relevant date for the assessment of compensation.[116]

International arbitral tribunal (under UNCITRAL Rules)

84. The arbitral tribunal in *Sergei Paushok et al. v. The Government of Mongolia* referred to the commentary to articles 14 and 15 dealing with continuing and composite acts, and determined that certain negotiations did not constitute continuing or composite acts or omissions.[117]

International arbitral tribunal (under the ICSID Convention)

85. The arbitral tribunal in *El Paso Energy International Company v. The Argentine Republic* referred to article 15 in finding that a series of measures taken by the Government of Argentina amounted to a "composite act".[118]

European Court of Human Rights

86. In its 2012 judgment in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[119]

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[113] See note 51 above, para. 111, note 53 (quoting Article 14.3 of the State responsibility articles).
[114] See note 84 above.
[115] See also the *Pac Rim Cayman LLC v. The Republic of El Salvador* case referred to above under article 14.
[116] ICSID, Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010, paras. 12-44, 12-45.
[117] See note 41 above, paras. 496-500.
[118] See note 16 above, para. 516.
[119] See note 84 above.

Article 16
Aid or assistance in the commission of an internationally wrongful act

European Court of Human Rights

87. In its 2012 judgment in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[120]

Chapter V
Circumstances precluding wrongfulness

General comments

Article 22
Countermeasures in respect of an internationally wrongful act

International Court of Justice

88. In its judgment in the *The Former Yugoslav Republic of Macedonia v. Greece*, the International Court of Justice referred to the State responsibility articles when rejecting the respondent's claim that "its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO".[121]

Article 23
Force majeure

Ad hoc committee (under the ICSID Convention)

89. In *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, the ad hoc committee upheld the arbitral tribunal's rejection of the applicability of the principle of "*imprevisión*" under Argentine law, as well as the tribunal's comparison with article 23 of the State responsibility articles, made in support of its decision, to the extent that "the theory of 'imprevisión' is expressed in the concept of *force majeure*".[122]

Article 25
Necessity

Ad hoc committee (under the ICSID Convention)

90. The ad hoc committee in *Sempra Energy International v. Argentine Republic*, while acknowledging the customary international law status of article 25, indicated that "[i]t does not follow, however, that customary law ... establishes a peremptory 'definition of necessity and the conditions for its operation'. While some norms of

[120] See note 84 above.

[121] International Court of Justice, *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, para. 164.

[122] ICSID, Case No. ARB/01/13, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 287.

customary law are peremptory (*jus cogens*), others are not, and States may contract otherwise ...".[123]

91. The committee highlighted the differences between article 25 and article XI of the bilateral investment treaty in question, in the following terms:

> "200. ... Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State'. Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful'. Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law."[124]

Ad hoc committee (under the ICSID Convention)

92. The ad hoc committee in *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic* treated article 25 as reflecting the "principle of necessity under customary international law".[125] Following an in-depth analysis[126] of the "only way" requirement in article 25, paragraph 1(a), the committee observed that the arbitral tribunal had been required "to determine whether, on the proper construction of Article 25(1)(a) of the ILC Articles, the 'only way' requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis".[127] It concluded that "the Tribunal did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue".[128] The committee further found the tribunal's treatment of the requirement that the measures adopted by Argentina "seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole",[129] within the meaning of paragraph 1(b), to be obscure.[130] The committee also analysed, and found shortcomings with, the tribunal's consideration of the aspect of "contribution to the situation of necessity", in paragraph 2(b).[131] The committee found fault with the tribunal's reliance on an expert opinion on an economic issue. It held that:

> "[t]he Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence

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[123] See note 4 above, para. 197.
[124] Ibid., para. 200.
[125] See note 122 above, para. 349.
[126] Ibid., paras. 368-376.
[127] Ibid., para. 377.
[128] Ibid.
[129] Ibid., para. 379 (emphasis omitted).
[130] Ibid. paras. 380-384.
[131] Ibid., paras. 385-392.

> before it, including the [expert opinion]. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "*contributed to the situation of necessity*" within the meaning of Article 25(2)(b). For the Tribunal to leap from the first step to the third without undertaking the second amount[ed] in the Committee's view to a failure to apply the applicable law."[132]

International arbitral tribunal (under the ICSID Convention)

93. In *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, the arbitral tribunal, upon consideration of the plea of necessity raised by the respondent, noted that:

> "[t]he severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles ... imposes additional strict conditions. The reason of course is that given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations ...".[133]

International arbitral tribunal (under the ICSID Convention)

94. The arbitral tribunal in *Total S.A. v. Argentine Republic* "recall[ed] that customary international law impose[d] strict conditions in order for a State to successfully avail itself of the defence of necessity" and continued that "Article 25 of the ILC Articles on State Responsibility [was] generally considered as having codified customary international law in the matter ...".[134]

International arbitral tribunal (under the ICSID Convention)

95. In *Impregilo S.p.A. v. Argentine Republic*, the arbitral tribunal, in considering a case arising from the 2001 Argentine financial crisis, evaluated *in extenso*, "... Argentina's necessity plea under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts", and determined that the applicable standard "by definition is stringent and difficult to satisfy".[135]

Ad hoc committee (under the ICSID Convention)

96. The ad hoc committee in *Continental Casualty Company v. The Argentine Republic* rejected the applicant's claim that the arbitral tribunal had failed to address its arguments in connection with "continuing post-'state of necessity' period loss" on the basis that it had not been a major argument in the proceedings before the

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[132] Ibid., para. 393.

[133] ICSID, Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 236.

[134] See note 29 above, para. 220.

[135] ICSID, Case No. ARB/07/17, Award, 21 June 2011, paras. 344, 345-359.

tribunal.[136] In reaching such conclusion, the committee recalled the "differences between Article XI of the BIT and the principle of necessity".[137]

International arbitral tribunal (under the ICSID Convention)

97. In *El Paso Energy International Company v. The Argentine Republic*, the arbitral tribunal analysed the differences between article XI of the treaty in question (which it deemed to be the *lex specialis*), and article 25 of the State responsibility articles (the *lex generalis*),[138] and referred to the reasoning of the Decision on Annulment in *Continental Casualty Company v. The Argentine Republic*.[139] Notwithstanding such differences, it considered, inter alia, the rule on "contributory behaviour", contained in article 25(2)(b), to be a "rule of general international law[] applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the [BIT]".[140]

International arbitral tribunal (under the ICSID Convention)

98. The arbitral tribunal in *EDF International S.A. et al. v. Argentine Republic*, upon considering the state of necessity defence as articulated in the State responsibility articles, found that the respondent had failed to meet its burden to demonstrate certain key elements as required by article 25, particularly that the wrongful act had been the only way to safeguard its essential interest, and that the respondent had not contributed to the situation of necessity. The Tribunal concluded that "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[141]

Article 27
Consequences of invoking a circumstance precluding wrongfulness

Ad hoc committee (under the ICSID Convention)

99. The ad hoc committee in *Continental Casualty Company v. The Argentine Republic* noted that the applicant's claim relied primarily on article 27 of the State responsibility articles. The committee recalled that the "Tribunal [had] expressly found ... that the effect of the application of Article XI of the BIT [was] different to the effect of the application of Article 25 (and by logical implication, of Article 27) of the ILC Articles".[142]

International arbitral tribunal (under the ICSID Convention)

100. The arbitral tribunal in *EDF International S.A. et al. v. Argentine Republic* found that the respondent had failed to demonstrate, as required under article 27, that

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[136] ICSID, Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 128.

[137] Ibid., paras. 116, 117-124.

[138] See note 16 above, paras. 553-555.

[139] See note 136 above.

[140] See note 16 above, para. 621.

[141] See note 31 above, para. 1171.

[142] See note 136 above, para. 127.

it had "return[ed] to the pre-necessity status quo when possible, or compensate[d] Claimants for damage suffered as a result of the relevant measures".[143]

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Article 29
Continued duty of performance

Arbitration Institute of the Stockholm Chamber of Commerce

101. In *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, the arbitral tribunal cited article 29 as authority for the proposition that "it is a generally recognized international law principle that, where the breach is of a continuing character, a Contracting Party has a continuing duty to perform the obligation breached".[144]

Article 30
Cessation and non-repetition

International Court of Justice

102. In its judgment in *Jurisdictional Immunities of the State (Germany v. Italy)*, the International Court of Justice, in response to a request by Germany that the Court "order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable",[145] indicated that:

> "[t]his is to be understood as implying that the relevant decisions should cease to have effect.
>
> According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing".[146]

Article 31
Reparation

International arbitral tribunal (under the ICSID Convention)

103. In *Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, the arbitral tribunal cited article 31, and the commentary thereto, as authority for the

[143] See note 31 above, para. 1171.
[144] Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V (064/2008), Final Award, 8 June 2010, para. 48.
[145] See note 104 above, paras. 15 and 137.
[146] Ibid., para. 137.

proposition that "a State is under an obligation to make full reparation for the injury caused by an internationally wrongful act".[147]

Court of Justice of the European Union

104. In its judgment in *Axel Walz v. Clickair SA*, the Court of Justice of the European Union sought to determine the ordinary meaning to be given to the term "damage" by reference, inter alia, to article 31, paragraph 2, of the State responsibility articles,[148] which it considered as "codify[ing] the current state of general international law [and could] thus be regarded as ... expressing the ordinary meaning to be given to the concept of damage in international law".[149]

International arbitral tribunal (under the ICSID Additional Facility Rules)

105. In its award, the arbitral tribunal in the *Gemplus S.A. et al. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* cases, in analysing the causal link between the breach of the treaty in question and the loss sustained by the claimant, indicated that "[a]s to causation generally, it [was]...useful to refer to" article 31 of the State responsibility articles, and in particular to the obligation to make full reparation for the injury "caused by the intentionally wrongful act of a State".[150] The tribunal proceeded to quote, *in extenso*, paragraph (10) of the commentary on article 31 on the question of the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise.[151]

106. The tribunal subsequently indicated that, "[a]s to the general approach to the assessment of compensation", it was guided by both the decision of the Permanent Court of International Justice in the *Chorzów Factory* case, and by article 31 of the State responsibility articles which it considered to be "declaratory of international law".[152]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

107. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber, in analysing the scope of liability under UNCLOS, confirmed that the "obligation for a State to provide for a full compensation or *restituto in integrum* [was] currently part of customary international law."[153] In support of its conclusion, the Chamber referred to the decision of the Permanent Court of International Justice in the *Chorzów Factory* case,[154] and indicated that:

> "[t]his obligation was further reiterated by the International Law Commission [in] article 31, paragraph 1, of the ILC Articles on State Responsibility...".[155]

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147 See note 36 above, paras. 467 and 468.

148 Court of Justice of the European Union, Third Chamber, *Axel Walz v. Clickair*, Judgment, 6 May 2010, para. 27.

149 Ibid., para. 28.

150 See note 116 above, para. 11.9.

151 Ibid., para. 11.10.

152 Ibid., para. 12-51.

153 See note 10 above, para. 194.

154 Permanent Court of International Justice, Series A, No. 17, p. 47.

155 See note 10 above, para. 194.

International arbitral tribunal (under the ICSID Convention)

108. The arbitral tribunal in *Joseph C. Lemire v. Ukraine* cited article 31 as authority for the proposition that "a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained".[156]

International arbitral tribunal (under the ICSID Convention)

109. The commentary to article 31 was cited by the arbitral tribunal in *El Paso Energy International Company v. The Argentine Republic* in support of the assertion that "the test of causation is whether there is a sufficient link between the damage and the treaty violation".[157]

Permanent Court of Arbitration (under UNCITRAL Rules)

110. The arbitral tribunal in *Chevron Corporation & Texaco Petroleum Company v. the Republic of Ecuador* referred to Part Two of the State responsibility articles as expressing the legal principle concerning claims for moral damages.[158]

International arbitral tribunal (under the ICSID Convention)

111. The arbitral tribunal in *Railroad Development Corporation v. Republic of Guatemala* considered article 31, paragraph 1, to reflect the customary international law rule applicable in ascertaining the "minimum standard of treatment" to be applied in the case of breaches of the treaty in question.[159]

International arbitral tribunal (under the ICSID Convention)

112. In its award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, the arbitral tribunal, in an analysis of the concept of "contributory negligence", referred to articles 31 and 39 of the State responsibility articles, and took note of paragraph (13) of the commentary to article 31.[160]

113. In its subsequent consideration of the claimant's claims for consequential damages, the tribunal held that "[t]he availability of consequential loss in international law is uncontroversial", and referred to the principle of "full reparation" expressed in the *Chorzów Factory* case.[161] The tribunal indicated further that "[t]his principle is now also embodied in Article 31 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ...".[162]

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[156] ICSID, Case No. ARB/06/18, Award, 28 March 2011, para. 147.
[157] See note 16 above, para. 682, note 644.
[158] See note 45 above, para. [9.6].
[159] See note 105 above, para. 260.
[160] See note 50 above, paras. 665-668.
[161] Ibid., para. 792.
[162] Ibid., para. 793.

Article 32
Irrelevance of internal law

Permanent Court of Arbitration (under UNCITRAL Rules)

114. The arbitral tribunal constituted to hear the *Hulley Enterprises Limited v. The Russian Federation*, *Yukos Universal Limited v. The Russian Federation* and *Veteran Petroleum Limited v. The Russian Federation* cases accepted an expert opinion, submitted by James Crawford, which cited articles 3 and 32 in support of the proposition that there existed "a strong presumption of the separation of international from national law".[163]

Chapter II
Reparation for injury

Article 34
Forms of reparation

International Court of Justice

115. In its judgment in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the International Court of Justice cited, inter alia, articles 34 to 37 of the State responsibility articles in support of its assertion that "where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both".[164]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

116. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber referred, with approval, to article 34 of the State responsibility articles.[165] It further expressed the view that "the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*".[166]

Article 35
Restitution

Arbitration Institute of the Stockholm Chamber of Commerce

117. In *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, the arbitral tribunal, citing article 35, observed that "[t]he ILC Articles contemplate restitution as the principal remedy for internationally wrongful conduct", and recalled that "[t]he goal of restitution [was] to restore the investor to his position before the wrongful conduct" and that "[t]his remedy, however, should not be granted where its implementation is materially impossible ... If such case, the ILC Articles would envisage a claim for damages as the available alternative".[167]

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[163] See notes 24, 25 and 26 above, para. 316.
[164] International Court of Justice, Judgment, *I.C.J. Reports 2010*, p. 14, at para. 273.
[165] See note 10 above, para. 196.
[166] Ibid., para. 197.
[167] See note 144 above, para. 52.

European Court of Human Rights

118. In *Laska and Lika v. Albania*, the European Court of Human Rights considered article 35 as reflecting international law relevant to the case.[168] It observed that:

> "in the instant case, a retrial or the reopening of the case, if requested by the applicant, represented in principle an appropriate way of redressing the violation ... This also reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts ...)".[169]

International Court of Justice

119. In the *Jurisdictional Immunities of the State (Germany v. Italy)* case, the International Court of Justice recalled that:

> "[a]ccording to general international law on the responsibility of States for internationally wrongful acts ... even if the [wrongful] act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles".[170]

Article 36
Compensation

International arbitral tribunal (under the ICSID Convention)

120. In its award in *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, the arbitral tribunal indicated that "[t]he *Chorzów Factory* standard is reflected today in the ILC's Articles on State Responsibility, and in particular in their compensation provision ...".[171] The tribunal then cited the commentary to article 36 in support of the proposition that "compensation is generally assessed on the basis of the [Fair Market Value] of the property rights lost".[172] The tribunal also relied on article 36 in providing guidance on the applicable standard of compensation for breach of a provision requiring fair and equitable treatment, in a context where the treaty in question was silent on the point.[173]

Arbitration Institute of the Stockholm Chamber of Commerce

121. In *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, the arbitral tribunal cited article 36 in support of the assertion that "[w]here damage is not made

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[168] ECHR, Fourth Section, Applications nos. 12315/04 and 17605/04, Judgment, 20 July 2010, para. 35.

[169] Ibid., para. 75 (internal citation omitted).

[170] See note 104 above, para. 137.

[171] See note 36 above, para. 504.

[172] Ibid., para. 505.

[173] Ibid., para. 532.

good by way of restitution, then the ILC Articles envisage monetary compensation for the damage shown to be caused by the misconduct".[174]

International arbitral tribunal (under the ICSID Additional Facility Rules)

122. In its award, the arbitral tribunal in the *Gemplus S.A. et al. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* cases relied upon article 36 of the State responsibility articles, and the commentary thereto, in its analysis of the claimants' claim for compensation.[175] Hence, it noted that "Article 36 contains two express requirements, (i) that the damage be 'financially assessable', i.e. capable of being evaluated in money, and that it be 'established', i.e. such that the remedy be commensurate with the injured party's proven loss and thus make it whole in accordance with the general principle expressed in *The Chorzów Factory* Case as regards compensation for an illegal act ...".[176]

123. It further pointed to the commentary to paragraph (2) of article 36, as providing guidance when considering "the quality of evidential proof required of a claimant to establish a claim, directly or indirectly, based on lost future profits under international law",[177] and noted that the commentary emphasized "'certainty' to be established evidentially by a claimant in all cases".[178] However, the tribunal took the view that it was clear from other legal materials cited in the commentary that the "concept of certainty [was] both relative and reasonable in its application, to be adjusted to the circumstances of the particular case".[179] It subsequently indicated that it was,

> "addressing contingent future events and not actual past events; it [was] seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involve[d] the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It [was] not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal [could] only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in 'sufficient certainty', as indicated by the ILC's Commentary cited above".[180]

International arbitral tribunal (under the ICSID Convention)

124. In its award in *Joseph C. Lemire v. Ukraine*, the arbitral tribunal, referring to article 36, paragraph 2, as reflecting the accepted understanding of the purpose of compensation, indicated that it only provided,

> "a theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic

[174] See note 144 above, paras. 52 and 65.
[175] See note 116 above, paras. 13-80 to 13-83.
[176] Ibid., para. 13-81.
[177] Ibid., para. 13-82.
[178] Ibid., para. 13-83.
[179] Ibid.
[180] Ibid., para. 13-91.

value which, in all probability, the investor would enjoy, 'but for' the State's breach".[181]

125. The tribunal also relied upon article 36 in support of its assertions that "[t]he duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act",[182] and that compensation for speculative claims is not typically awarded.[183]

International arbitral tribunal (under the ICSID Convention)

126. In *El Paso Energy International Company v. The Argentine Republic*, the arbitral tribunal, citing the commentary to article 36, indicated that "[t]he reference to '*loss of profits*' in Article 36(2) confirms that the value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is '*financially assessable*', therefore not speculative".[184]

International arbitral tribunal (under the ICSID Convention)

127. In its award in *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, the arbitral tribunal referred to the State responsibility articles, particularly articles 34 through 39, as constituting "subsequent international practice" reflecting "the compensation standard under customary international law".[185]

International Court of Justice

128. In its judgment on compensation in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice cited, inter alia, the commentary to article 36 of the State responsibility articles in support of the proposition that "[w]hile an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative".[186]

Article 37
Satisfaction

International arbitral tribunal (under the ICSID Convention)

129. In its decision on jurisdiction in *Quiborax S.A. et al. v. Plurinational State of Bolivia*, the arbitral tribunal decided that it was more appropriate to entertain in the final award on the merits the claimants' request for a declaratory judgment pursuant to article 37.[187]

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[181] See note 156, para. 152.
[182] Ibid., para. 155.
[183] Ibid., paras. 245-246.
[184] See note 16 above, para. 710.
[185] ICSID, Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 306.
[186] International Court of Justice, Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment of 19 June 2012, para. 49.
[187] ICSID, Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 308.

Article 38
Interest

International arbitral tribunal (under the ICSID Convention)

130. In *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, the arbitral tribunal cited article 38, and the commentary thereto, in support of the assertion that "the awarding of interest depends on the circumstances of each case and, in particular, whether an award of interest is necessary in order to ensure full reparation".[188]

International arbitral tribunal (under the ICSID Convention)

131. The arbitral tribunal in *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* cited article 38, paragraph 2, in support of its assertion that "[t]he virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due".[189]

International arbitral tribunal (under the ICSID Convention)

132. In *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, the arbitral tribunal, citing article 38, paragraph 1, indicated that "[c]ustomary international law, as reflected in the ILC articles, broadly indicates that the interest rate should be set to achieve the result of full reparation".[190]

Article 39
Contribution to the injury

International arbitral tribunal (under the ICSID Additional Facility Rules)

133. In its award, the arbitral tribunal in the *Gemplus S.A. et al. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* cases cited article 39 in its analysis of the concept of "contributory negligence", and referred to the treatment of the concept in paragraph (5) of the commentary to the article when drawing the conclusion that "[t]he common feature [was] a fault by the claimant which ha[d] caused or contributed to the injury which [was] the subject-matter of the claim; and such a fault [was] synonymous with a form of culpability and *not* any act or omission falling short of such culpability".[191]

International arbitral tribunal (under the ICSID Convention)

134. In *Joseph C. Lemire v. Ukraine*, the arbitral tribunal considered article 39 as providing "supplementary guidance" to judges and arbitrators attempting to define and give content to the specific elements required by article 36 of the State responsibility articles.[192]

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[188] See note 36 above, paras. 659 and 660.
[189] ICSID, Case No. ARB/07/29, Award, 10 February 2012, para. 184.
[190] See note 185 above, para. 320.
[191] See note 116 above, paras. 11.12 and 11.13.
[192] See note 181, para. 156.

International arbitral tribunal (under the ICSID Convention)

135. In *El Paso Energy International Company v. The Argentine Republic*, the arbitral tribunal cited article 39 in support of its finding that "[t]here [was] no contribution by the Claimant to a loss it suffered due to its own conduct, in the absence of wilful or negligent action by the Claimant".[193]

International arbitral tribunal (under the ICSID Convention)

136. In its award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, the arbitral tribunal referred to articles 31 and 39 of the State responsibility articles in its analysis of the concept of "contributory negligence".[194] The tribunal relied upon article 39, and the commentary thereto, in its analysis of the extent to which the damages owed to the claimants for the wrongful act of the respondent were to be reduced as a consequence of the claimant's own wrongful conduct.[195]

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
Particular consequences of a serious breach of an obligation under this chapter

International Court of Justice

137. In *Jurisdictional Immunities of the State (Germany v. Italy)*, the International Court of Justice rejected the respondent's argument that a conflict existed "between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another".[196] Instead, the Court held that,

> "[t]he two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful ... . [R]ecognizing the immunity of a foreign State in accordance with customary international law [did] not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so [could not] contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility".[197]

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[193] See note 16 above, para. 684, and note 648 thereto.
[194] See note 50 above, paras. 665-668.
[195] See ibid., paras. 665-666 and 673.
[196] See note 104 above, para. 93.
[197] Ibid.

Part Three
The implementation of the international responsibility of a State

Chapter I
Invocation of the responsibility of a State

Article 48
Invocation of responsibility by a State other than an injured State

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

138. In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber considered which subjects were entitled to claim compensation for "damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment".[198] It expressed the opinion that while,

> "[n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim[, it] may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility ...".[199]

Part Four
General provisions

Article 55
Lex specialis

WTO panel

139. In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the panel, after finding that there existed "no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles [on State responsibility] must be 'taken into account' as 'rules of international law applicable in the relations between the parties' in interpreting the WTO Agreement",[200] and that "even by their own terms, the Draft Articles 'do not attempt to define the content of the international obligations the breach of which gives rise to responsibility'",[201] recalled that the State responsibility articles also contain a provision on *lex specialis*.[202] The panel then proceeded to explain why it

[198] See note 10 above, para. 179.
[199] Ibid., para. 180.
[200] See note 5 above, para. 8.89.
[201] Ibid., para. 8.90 (quoting para. (1) of the General commentary of the State responsibility articles).
[202] Ibid., para. 8.90.

considered article 1.1 of the SCM Agreement to be a special rule of international law:

> "[w]e view the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of 'government' for purposes of the Agreement, as well as when 'private' actors may be said to be acting on behalf of 'government'. This has precisely to do with 'the content or implementation of the international responsibility of a State' for purposes of the SCM Agreement, a further indication that the Draft Articles are not relevant to interpreting Article 1.1 of the SCM Agreement".[203]

WTO Appellate Body

140. In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body considered the scope and meaning of article 55 of the State responsibility articles in the following terms:

> "[a]s we see it, Article 55 of the ILC Articles does not speak to the question of whether, for the purpose of interpreting Article 1.1(a)(1) of the SCM Agreement, a panel or the Appellate Body can take into account provisions of the ILC Articles ... Article 55 addresses the question of which rule to *apply* where there are multiple rules addressing the same subject matter. The question in the present case, however, is not whether certain of the ILC Articles are to be *applied* ... There is no doubt that the provision being applied in the present case is Article 1.1(a)(1). Rather, the question is, whether, when interpreting the terms of Article 1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements. Thus, the treaty being *applied* is the SCM Agreement, and the attribution rules of the ILC Articles are to be *taken into account* in interpreting the meaning of the terms of that treaty. Article 55 of the ILC Articles does not speak to the issue of how the latter should be done."[204]

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[203] Ibid. (quoting, inter alia, article 55).

[204] See note 11 above, para. 316.